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No. 82-234

SUPREME COURT OF THE UNITED STATES

October Term, 1982

AUDREY M. LEE, *et al.*,
Petitioner (s),

v.

SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ON BEHALF OF RESPONDENTS SHIELD PETROLEUM CORPORATION, VIKING RESOURCES CORPORATION AND JAMES C. EIGEL

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I.

QUESTIONS PRESENTED

1. WHERE THE INITIAL CERTIFICATION OF THE CLASS WAS ONLY TENTATIVE, MAY A DISTRICT COURT DECERTIFY THE CLASS AT THE CONCLUSION OF TRIAL BUT BEFORE RULING ON THE MERITS?

2. WHETHER PETITIONER'S REQUEST THAT THE DISTRICT COURT DEFER ITS DECISION ON A MOTION TO INTERVENE CONSTITUTES "DENIAL" OF THE MOTION.

3. WHETHER THE ENTIRE INVESTIGATIVE FILE OF THE SECURITIES AND EXCHANGE COMMISSION MAY BE INTRODUCED AFTER THE CONCLUSION OF TRIAL ON THE MERITS, AND AFTER THE COURT'S RULING THAT THE PETITIONER'S CLAIMS ARE TIME-BARRED.

4. WHETHER AN ACTION BASED ON FAILURE TO REGISTER AS A BROKER-DEALER CONSTITUTES AN ACTION BASED ON FRAUD, WHICH CAUSE OF ACTION, IF ANY, WAS NEVERTHELESS TIME-BARRED.

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Respondents Shield Petroleum Corporation, Viking Resources Corporation and James C. Eigel respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit, Case No. 79-3416/17. The opinion below is unreported but is set forth in Petitioner's Appendix at p. 18a.

STATEMENT OF THE CASE

Respondent Shield Petroleum Corporation ("Shield") offered oil and gas drilling ventures pursuant to the Regulation B exemption under the Securities Act of 1933, 15 U.S.C. § 77c(b). The offering circulars are known as Schedule D circulars ("the Circulars"). In 1969 and 1970, Petitioner invested a total of $5,471.88 with Shield by purchasing certain 1/64th interests in five wells to be drilled by Shield in accordance with the Circulars. Petitioner invested on the advice of her attorney, who also represented her in this case, Clement Theodore Cooper. Mr. Cooper was himself an investor in other Shield programs.

Petitioner did *not* invest in any of the public drilling programs or private limited partnerships offered by Viking Resources Corporation ("Viking").

James C. Eigel ("Eigel") never sold any interests in these programs in his individual capacity, although he and other officers of Shield did sell the Regulation B, Schedule D interests on behalf of Shield. Shield did not offer any programs after 1970. The 1971 and 1972 Viking public oil and gas programs were sold through broker-dealers registered with the National Association of Securities Dealers ("NASD"). Eigel registered as a broker-dealer in 1972, prior to the sale of the 1972 Viking program and prior to the sale of limited partnership interests offered in other programs in 1972-1974.

Each of the wells in which Petitioner invested was drilled, completed and, where commercially feasible, placed into production by Shield. Petitioner's Appendix, pp. 9a - 11a. Petitioner presented no evidence which demonstrated any impropriety in the drilling of the wells, or the payment or amount of royalties to herself and the other investors in those programs. Petitioner presented no evidence that

Respondents fraudulently concealed any information from the investors. Petitioner's Appendix, p. 19a.

Under each Regulation B, Schedule D program, Shield was required to retain at least 16/64ths interest in each well. In addition, any unsold interests in the programs were retained by Shield. Petitioner's Appendix p. 10a. Because Shield retained ownership interests in each well in which Petitioner was an investor (Petitioner's Appendix, pp. 10a - 11a), Shield was entitled to receive royalty payments in proportion to its ownership interest. Petitioner presented no evidence concerning improper payment of royalties to Shield, or excessive charges by Respondents for the work performed for drilling, testing or completing the wells.

As the district court found, Petitioner proved no claim against Viking. Petitioner's Appendix, p. 13a.

In a timely manner after the commencement of this suit, the district court issued a class action certification order (Petitioner's Appendix, pp. 1a - 5a) expressly stating in its order that the class was only being "tentatively defined" (Petitioner's Appendix, p.2a), and that certification was "conditional only and may be altered prior to a decision on the merits." Petitioner's Appendix, p. 5a. The conditional certification of the class was consistent with the provisions of Rule 23 (c) (1), Federal Rules of Civil Procedure. The Notice of Class Action also stated that certain affirmative defenses had been advanced by Respondents and that all allegations of wrongdoing had been denied. Petitioner's Appendix, p. 3a. The affirmative defenses included the defense that Petitioner's claims were barred by the applicable statute of limitations.

Regarding the statute of limitations, Respondents note that Petitioner's last purchase of Shield's interests was made in December, 1970 (Petitioner's Appendix, p. 15a), and

that suit was not commenced until more than six years later, in February, 1977. Petitioner's Appendix, p. 13a.

Petitioner asserted as one basis for relief the failure of the sellers of the Shield Regulation B, Schedule D programs to register as broker-dealers. After viewing the various statutes of limitations which might apply, the district court found the claim to be time-barred. Petitioner's Appendix, pp. 12a - 13a. Having held that mere failure to register as a broker-dealer would not support a claim of fraud (Petitioner's Appendix, p. 13a), and given Petitioner's lack of any proof that the applicable statute of limitations was tolled for any reason, the remaining claims were dismissed as to Petitioner. Petitioner's Appendix, p. 13a - 14a.

Prior to dismissing the remainder of the suit as being time-barred, the district court had granted Respondent's motion for a directed verdict as to the majority of the fraud allegations in the Complaint for the reason that Petitioner had offered no evidence which proved these counts. Respondents' Appendix, pp. 4a - 8a.

With regard to the broker-dealer issue as it pertained to the sale of the Viking programs in 1970 and 1971, Petitioner presented no evidence which would have tolled the applicable four year statute of limitations until February, 1977. Therefore, even had the class not been decertified because of the inadequacy of Petitioner's individual capacity as the class representative, the claims as to the other investors were also necessarily time-barred by Petitioner's unexcused delay in commencement of the action on their behalf. Moreover, Petitioner's statement of the statute of limitation issue as it pertains to the broker-dealer question ignores the fact that the 1971 Viking program was sold on behalf of Viking by NASD registered broker-dealers.

Immediately prior to the commencement of the trial, Petitioner presented argument in support of a motion to

intervene pursuant to Rule 24, Federal Rules of Civil Procedure. The putative intervenors were investors in the Viking oil and gas programs and, as such, were already included in the class as defined by the Court's class certification order. Petitioner's Appendix, p. 2a. The motion to intervene was *not* denied by the district court. Rather, before trial, Petitioner asked the court to "defer" ruling on the motion to intervene, subject to it being withdrawn by Petitioner. Respondents' Appendix, pp. 1a - 3a. The matter was never again raised by Petitioner.

After the conclusion of the trial, Petitioner sought to introduce a copy of an investigative file obtained from the Securities and Exchange Commission. This "motion to supplant the record" was denied as moot since Petitioner's claims had already been found to be time-barred. Petitioner's Appendix, p. 17a. Accordingly, no ruling as to the admissibility of all or any part of the Securities and Exchange Commission files was made by the district court.

The Sixth Circuit Court of Appeals affirmed (Petitioner's Appendix, pp. 18a - 20a), holding that Petitioner's claim was time-barred, that there had been no tolling of the applicable statute of limitations, and that Petitioner was not an adequate class representative. The Sixth Circuit held that, since the Petitioner's claims were time-barred, the district court's rulings on all other subsidiary issues flow logically from this conclusion. Petitioner's Appendix, p. 20a.

REASONS TO DENY WRIT

Petitioner's brief fails to address the factual basis for the decertification of the class.

The Petitioner waited more than six years from the date of her last purchase of any interest in a Shield program until commencing suit. Both Petitioner and her attorney and advisor, Clement T. Cooper, were aware within two years of Petitioner's last such purchase that the wells were returning minimal royalties, and Mr. Cooper had advised Petitioner that an oil and gas investment was "risky." Petitioner's Appendix, p. 19a.

The underlying issue which Petitioner avoids throughout her Brief is that the claims are necessarily time-barred as the result of her failure to demonstrate any fraudulent concealment of geological, economic or other information concerning any of the Shield or Viking drilling ventures. Petitioner's Appendix, p. 19a. Petitioner also studiously avoids the necessary consequences of her failure, and that of her attorney and advisor, to pursue with the required diligence an investigation of the reasons for the failure of the drilling ventures. Petitioner's Appendix, p. 19a. This case presents a classic fact pattern where the doctrine of equitable tolling of the statute of limitations does not apply.

The other issues raised by Petitioner crumble on the unstable foundation of her time-barred claims. The district court had the power to decertify the tentatively certified class at any time prior to its decision on the merits. Rule 23 (c) (1), Federal Rules of Civil Procedure. Because Petitioner's claims were time-barred, she ceased to be an adequate class representative. Petitioner's Appendix, p. 19a. The tentatively certified class became fatally infirm and had to be decertified by the district court before it ruled on the merits of Petitioner's claims in order to preserve any claim which other putative class members may have had.

With regard to the motion to intervene, the motion was in effect withdrawn by Petitioner's counsel. Contrary to Petitioner's representation, the motion was not "denied" by the district court at any time in the course of the proceedings below. Respondents' Appendix, pp. 1a - 3a.

The attempt by Petitioner to introduce the Securities and Exchange Commission file after the conclusion of trial was properly denied as moot. No ruling was made by the district court on the admissibility of part or all of these files. Petitioner's Appendix, p. 17a.

Finally, the contention that the broker-dealer issue amounts to an action in fraud was specifically rejected by the district court. Petitioner's Appendix, p. 13a. While it is the position of Respondents that under the Regulation B exemption to the Securities Act of 1933 they were not required to register as a broker-dealer for the sale of programs in 1969 and 1970, any claim by Petitioner based on such a failure to register was absolutely time-barred under any applicable statute of limitations. The same is true for any sale of the Viking public programs in 1970 and 1971. *Nichels* v. *Koehler Mgmt. Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. den.* 429 U.S. 1074 (1977); *Gaudin* v. *K.D.I. Corp.*, 576 F.2d 708 (6th Cir. 1978), *aff'ing* 417 F.Supp. 620 (S.D. Ohio 1976).

Contrary to Petitioner's representations, there has been no showing: (a) that the Sixth Circuit Court of Appeals rendered a decision which is in conflict with the decisions of other Courts of Appeal involving similar issues, or (b) that the Sixth Circuit Court of Appeals has decided a federal question in such a way as to conflict with prior decisions of this Court, or (c) that the Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Rather than acknowledge the failure of proof on the merits which resulted in the directed verdict in favor of Respondents on the majority of Petitioner's claims (Respondents' Appendix, pp. 5a - 8a), the Petitioner devotes the majority of her Petition to reciting the unproven and unsubstantiated allegations in her Complaint. By merely repeating her contentions, Petitioner apparently seeks to avoid the fatal consequences of her unexplained failure to commence her suit in a timely manner.

CONCLUSION

For all of the reasons discussed above, this Court must reject the Petition for Writ of Certiorari. Given the absolute failure of Petitioner's proof on Respondents' statute of limitations defense, all other issues which Petitioner seeks to raise are moot.

WHEREFORE, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

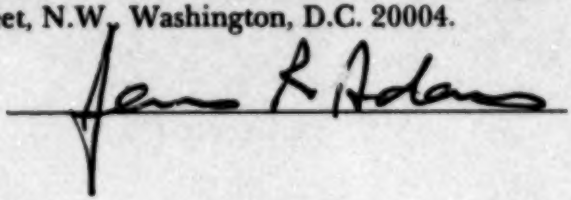
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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served by sending three copies of Respondents' Brief In Opposition to Petition For Writ of Certiorari To The United States Court of Appeals by regular mail, this day September 9, 1982, to Clement Theodore Cooper, Esq., 918 F. Street, N.W., Washington, D.C. 20004.



APPENDIX A

[3] MONDAY MORNING SESSION,

July 3, 1978.

— — —

THE COURT: Gentlemen, good morning.

This is the matter of Audrey Lee versus Shield Petroleum, 77-99.

Gentlemen, there is a motion pending for intervention, and I must confess I don't understand it.

Mr. Mesh, do you wish to be heard on this motion very briefly?

MR. MESH: Thank you, Your Honor. My purpose in addressing the motion this morning is simply to submit an affidavit that has not yet been before the Court in support thereof.

THE COURT: Well, before you do that, Mr. Mesh, let me ask you one or two questions. Do I understand that the same counsel represent the intervening plaintiff?

MR. MESH: Yes.

THE COURT: Do I understand you are seeking to decertify the class action?

MR. MESH: No, Your Honor.

THE COURT: Under what principle of law do you have an intervention with the same counsel in a class action?

[4] MR. MESH: The right of intervention is a right that is available to any class member.

THE COURT: Are you asserting this to be a mandatory intervention or permissive intervention? Under what part of Rule 24 do you proceed?

MR. MESH: I would like to let Mr. Cooper address that particular point, Your Honor, since he drafted the brief.

Let me assure Your Hono that the purpose of asking for intervention at this point was to counter any possible argument that the Defendants could make in any appeal of the Court's class certification. The argument had been made that the interests of the Viking shareholders could not be properly represented by a Shield security-holder, and we are attempting simply —

THE COURT: But that position, Mr. Mesh, was made a long time ago. Now, if I grant intervention, doesn't the Defendant have a right to conduct discovery, take depositions, file interrogatories as to this intervening Plaintiff?

MR. MESH: They have done that with Mr. Miller. His deposition has been taken.

THE COURT: When.

MR. MESH: This week. We have a copy of it today. Mr. Adams has taken his deposition, and [5] we have gone through the discovery process in that regard.

THE COURT: Well, Mr. Mesh, I simply do not understand a motion in a class action of intervention. Now, if somebody wishes to be named and made an additional named Plaintiff, that is something else, but this is intervention under Rule 24, and I a munaware of any application of Rule 24 to a class action.

MR. MESH: I had intended, Your Honor, to suggest that any action on that be deferred at this particular point in time.

THE COURT: Well, all right. My main purpose in interrogating you is to find out whether or not you gentlemen wish to have this decertified as a class action, in which event intervention becomes an entirely different matter.

MR. MESH: Obviously we do not want that.

THE COURT: You have asserted that this Plaintiff meets all prerequisites of the class plaintiff, and I think it

is somewhat late in the day now to be heard that she does not.

MR. MESH: We are not suggesting at all that she does not.

THE COURT: Then, what is the reason for intervention?

[6] MR. MESH: Your Honor, we were contacted by certain class members, these people particularly who did have conversations with counsel regarding their position as Viking securityholders. After conversation, it was the belief of counsel before Your Honor that it might be appropriate to seek intervention in order to have a Viking securityholder named as a party plaintiff in the class and as a representative in the class. I see Your Honor's position in the sense —

THE COURT: I have strong questions about this, Mr. Mesh. I think this is violative of the concept of a class action, and if it is the same attorneys, certainly there is no question as sometimes in an intervention there is the question of whether or not attorneys are experienced enough to handle the case, and somebody wishes to intervene with his own attorney, but that is not the case here.

MR. MESH: Well, Your Honor, I wonder if I could at this point ask the Court to defer any decision on the motion? It may be subject to our request that it be withdrawn at a later time.

THE COURT: Good enough. There is no reason, then, that this matter be heard at this time, and so let's go forward into the merits of the case.

MR. MESH: Very good, Your Honor.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-77-99

AUDREY LEE,

Plaintiff,

v.

SHIELD PETROLEUM, et al,

Defendants.

(Filed July 14, 1978)

ORDER

This matter is before the Court on the motion of defendant for a directed verdict at the conclusion of plaintiffs' case. Such motion was made orally after testimony of seven witnesses and the submission of in excess of one hundred fifty exhibits. Mindful of the admonition of the United States Court of Appeals for the Sixth Circuit in *Sawyer* v. *Methodist Hospital*, 522 F.2d 1102, the Court finds that the plaintiff has presented sufficient evidence to defeat such motion as it relates to the allegations in Paragraphs 1 through 27, inclusive, of plaintiff's complaint.

Plaintiff has not met her burden of proof for the allegations contained in Paragraphs 28 through 34, inclusive, entitled "Misappropriation, Diversion and Commingling

of Investors' money"; Paragraph 35 entitled "Undisclosed Tax Risk"; Paragraphs 36 through 38, inclusive, entitled "Conduct in Connection with Development Calls"; Paragraphs 39 through 41, entitled "Count Two, Common Law Fraud"; and Paragraphs 42 through 48, inclusive, entitled "Count Three, Poor Accounting."

In accordance with the foregoing, defendant's motion for a directed verdict is hereby GRANTED IN PART and DENIED IN PART.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO – WESTERN DIV.

CIVIL ACTION FILE NO. C-1-77-99

AUDREY LEE

v.

SHIELD PETROLEUM, ET AL

(Filed July 14, 1978)

JUDGMENT

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's oral motion for directed verdict is hereby granted in part and denied in part.

Dated at Cincinnati, Ohio, this 14th day of July, 1978.

JOHN D. LYTER
Clerk of Court

/s/ ANN CATANZARO
Deputy Clerk

APPENDIX D

[551] THE COURT: Perhaps I can deal with some of these things. For example, there are some subtitles in here, and perhaps I can deal with those.

The subtitle entitled Undisclosed or Acquisition Arrangements on Page 9, anod that is Paragraphs 23, 24, and 25 — I am not sure I can handle it in this fashion because there are portions of the allegations that simply there is just no proof of.

MR. ADAMS: That's right.

THE COURT: On the other hand, there are items which there is some proof of, and I think that I will simply let that one alone.

Misappropriation, diversion and co-mingling of investors' money, there has been no proof on that, so I will sustain the motion to Paragraphs 28, 29, 30, 31, 32, 33, and 34.

There has been no evidence as to Paragraph 35 entitled Undisclosed Tax Risk.

There has been no evidence as to Paragraphs 36, 37, and 38.

Count 2 which is common law fraud, there has been no evidence of that, and Count 2 will be dismissed.

There has been no evidence as to Count 3 which requests an accounting. That would be Paragraphs 42, 43, 44, 45, 46, 47, and 48. As to those matters, I will grant [552] the motion for directed verdict.

Other than those, I will simply deny the motion, and I would state, Mr. Adams, that evidence that you may wish to present dealing with the solicitation of investment, the investment itself, the procedures used in the drilling of wells are matters that are pertinent, and you may wish to present evidence regarding them.

MR: ADAMS: Solicitation of investments, Your Honor, in the sense of assembling the program from a geological standpoint?

THE COURT: Yes.

MR. ADAMS: And what information we had at hand when we put the program together? I don't want to go into anything more than I need to.

THE COURT: I understand, Mr. Adams, and I am trying not to.

MR. ADAMS: I understand you are not trying to catch me off-guard.

THE COURT: We are both walking a tightrope here. I don't want to mislead you.

MR. ADAMS: I understand.

THE COURT: At this particular point, the evidence before the Court deals almost entirely with the evidence of the last witness, Mr. Yedlosky.

MR. ADAMS: That is all I need to know.